91-214

No. 91-

IN THE

Supreme Court of the United States

October Term, 1991

TEMPLE OF THE LOST SHEEP INC., a/k/a Action Committee to Help the Homeless Now, and HENRY JEROME MACKEY, a/k/a Jerome Mackey,

Petitioners,

- v. -

ROBERT ABRAMS, Attorney General of the State of New York, NEW YORK NEWS INC., JACK NEWFIELD, JOHN DAVIS, THOMAS WHELAN, and JILL LAURIE GOODMAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENTS NEW YORK NEWS INC. AND JACK NEWFIELD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 30, 1991

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QUESTION PRESENTED

Whether this Court should grant a Writ of Certiorari to review an order of the Court of Appeals affirming the dismissal of Petitioners' federal civil rights claims on the basis of collateral estoppel, where issues essential to Petitioners' federal claims were necessarily decided in a prior state court proceeding in which petitioners had a full and fair opportunity to litigate such issues, and where the district court had deferred to the state court by abstaining from exercising its jurisdiction under this Court's decision in *Younger v. Harris*.

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STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

The parent company of respondent New York News Inc. (now known as Tribune New York Holdings Inc.) at all times relevant to this action is and was Tribune Company. Excluding its wholly-owned subsidiaries, the following are the corporate affiliates of New York News Inc.: Quebec and Ontario Paper Co.; Manicovagan Power Co.; Quebec & Ontario Recycling; QNO Recycling Inc.; Tribune N.Y. Properties; Tribune New York Holdings Inc.; Tribune Properties Inc.; Chicago Tribune Company; Tribune Broadcasting Co.; KPLA Inc.; GWB Productions; Tribune Broadcasting News Network Inc.; Tribune Entertainment Co.; Magic J Music Publishing; Tribune N.Y. Radio Inc.; Tribune Production Inc.; Tribune Regional Programming Inc.; WGN Continental Broadcasting Co.; WGN of California Inc.; WGN of Colorado Inc.; Sun Sentinel Col.; News and Sun Sentinel Co.; Sentinel Communications Co.; Daily Press Inc.; Chicago Relay Assn.; Chicago Tribune Newspaper Inc.; Chicago Tribune Press Service Inc.; WGMX Inc.; Tribune California Properties, Inc.; Chicago National League Ball Club Inc.; QNO Paper Co., Ltd.; Newspapers Readers Agency Inc.; The Daily Press Inc.; Hampton Roads Newspaper Inc.; Gold Coast Publications Inc.; Pennisula Newspapers Inc.; Pennisula Community Newspaper Inc.; Times Advocate Co.; Twin County Community Newspaper Inc.; Sun Belt Publishing Co.; Tribune Media Services Inc.; and Tribune National Marketing Co.

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STATEMENT OF THE CASE

Petitioner Temple Of The Lost Sheep Inc., a/k/a Action Committee to Help the Homeless Now (the "Temple") and Petitioner *pro se* Henry Jerome Mackey, a/k/a/ Jerome Mackey ("Mackey") seek a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit affirming

the judgment of the United States District Court for the Eastern District of New York. *Temple of the Lost Sheep et al. v. Abrams et al.*, 930 F.2d 179 (2d Cir. 1991), and reprinted in Petitioners' Appendix I (hereinafter "App.") at 261-278. The courts below dismissed petitioners' federal constitutional claims on the grounds of collateral estoppel based on a prior related state court proceeding. The state court found petitioner had suffered no constitutional deprivation (App. at 135-136) and, therefore, the district court dismissed petitioners' claim that respondents conspired to violate petitioners' constitutional rights for failure to state a claim upon which relief may be granted, and dismissed petitioners' pendent state law claims for lack of subject matter jurisdiction. App. at 167-168.

The District Court applied the doctrine of collateral estoppel to bar petitioners' federal civil rights claims based on the New York Supreme Court's decision granting the State Attorney General's motion to compel compliance with subpoenas issued in connection with an administrative investigation. The state court adversely resolved issues central to petitioners' constitutional claims when it denied petitioners' cross motion to quash and granted the State Attorney General's motion to compel. In so doing, the state court necessarily determined that neither petitioners' First Amendment religious freedoms nor those guaranteed under the Fifth Amendment were being violated and that the State Attorney General was acting in good faith in connection with his investigation of petitioners. Petitioners had a full and fair opportunity to litigate their constitutional issues in state court, and actually raised those issues in support of their cross motion to quash the subpoenas. App. at 135-136; App. at 275-277. The District Court had abstained from exercising jurisdiction under *Younger v. Harris* while the state court proceeding was pending, and had advised petitioners that the outcome of the state court proceeding could resolve issues central to their federal claims. App. at 126-127.

PROCEDURAL HISTORY

Petitioners commenced this action by order to show cause on November 22, 1988 in the Eastern District of New York. Petitioners' primary allegation against respondents New York News Inc.[1] (then the publisher of the New York *Daily News*) and then *Daily News* columnist Jack Newfield (the "Daily News respondents") was that they "conspired" to further an illegal and unconstitutional investigation of petitioners by the New York State Attorney General, and that they published four news articles about petitioners in furtherance of the purported "conspiracy." App. at 33-34.

The Attorney General's investigation of petitioners began in October 1988, when the Attorney General issued investigative subpoenas to petitioners. Instead of responding to the subpoenas, petitioners made a motion in the District Court seeking, among other things, an injunction prohibiting the Attorney General from proceeding with his investigation of petitioners and an injunction requiring the *Daily News* to give "equal space" to petitioners in their publication. Following oral argument, those motions were summarily denied by the District Court (Raggi, J.) on December 6, 1988. App. at 157-163. Meanwhile, before any substantive proceedings had taken place in the District Court, the Attorney General commenced a state court proceeding to compel compliance with the subpoenas.

In January 1989, petitioners amended their complaint in an effort to avoid the *Younger* abstention doctrine. Nevertheless, on June 7, 1989, the District Court (Raggi, J.) issued an Order abstaining from exercising federal jurisdiction over petitioners'

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[1] New York News Inc. has changed its name and is now known as Tribune New York Holdings Inc. To avoid confusion, respondent is referred to herein by its former name.

federal claims, and staying the federal action pending the final outcome of the related state court proceeding. App. 106-128.

On January 4, 1990, the New York County Supreme Court issued its order granting the Attorney General's motion to compel petitioners' compliance with the subpoenas. App. 129-137. The court (Greenfield, J.) specifically rejected petitioners' defense based on their claim that their federal constitutional rights were being infringed by the Attorney General's investigation and found that the investigation was not being conducted in "bad faith." App. at 135. Petitioners then noticed an appeal from Justice Greenfield's decision. In an effort to "reactivate" the federal proceeding, however, petitioners withdrew their notice of appeal and allegedly complied with the subpoenas. Justice Greenfield's January 4, 1990 order thus became final for all purposes.

On April 13, 1990, the District Court granted petitioners' motion to vacate Judge Raggi's June 7, 1989 order staying the federal proceedings on the ground that the state court proceeding had then been concluded. On April 27, 1990, the Daily News respondents made a motion to dismiss petitioners' complaint and the District Court stayed all discovery pending its ruling thereon.

On September 26, 1990, the District Court granted defendants' motions to dismiss petitioners' complaint on the following grounds: the petitioners' claims arising under 42 U.S.C. § 1983 for violations of the First and Fourteenth Amendment rights were dismissed as barred by the doctrine of collateral estoppel based on the decisions of Judge Raggi and Justice Greenfield, and additionally, as to the Attorney General defendants, based upon qualified immunity. The petitioners' claims under 42 U.S.C. § 1985(3) were dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. The petitioners' pendent state law claims were

dismissed for lack of subject matter jurisdiction pursuant to the doctrine of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Petitioners appealed the District Court's order dismissing its complaint to the United States Court of Appeals for the Second Circuit. Petitioners argued that their federal conspiracy claims were not and could not have been actually determined in the state court proceeding, and that they were denied a full and fair opportunity to litigate these claims in an impartial forum. On April 5, 1991, the Court of Appeals (Feinberg, Circuit Judge) unanimously affirmed the District Court judgment and held that petitioners were collaterally estopped from pursuing their claims in federal court based on the prior related state court judgment. App. at 276. The Court of Appeals held that, because petitioners consciously chose not to appeal the state court findings, they could not argue that those findings were based on an inadequate record. App. at 277.

STATEMENT OF FACTS

A detailed description of the factual background surrounding this action is succinctly set forth in the Second Circuit's opinion in *Temple of the Lost Sheep Inc. v. Abrams*, 930 F.2d 178 (2d Cir. 1991), found in Petitioners' Appendix I at 261. For the Court's convenience, a summary of the essential facts follows.

During the relevant time period, respondent New York News Inc. was the publisher of the *Daily News*, and respondent Jack Newfield ("Newfield") was a *Daily News* staff writer and a regular *Daily News* columnist. Petitioners are an alleged church and shelter for homeless men in Queens, New York (the "Temple") and its Director, Mr. Henry Jerome Mackey ("Mackey").

The defendants John Davis ("Davis") and Thomas Whelan ("Whelan") are homeless persons who were originally admitted to the Temple shelter in 1988, but who later resigned from the organization. Jill Laurie Goodman ("Goodman") is an Assistant Attorney General who, on behalf of the Attorney General of the State of New York ("Attorney General") issued subpoenas to be served on Mackey and others in support of an administrative investigation into their activities in connection with the Temple.

Petitioners allege that the Attorney General and his predecessor have led a concerted and ongoing conspiracy to deprive the Temple and Mackey of their constitutional rights for many years. Mackey was the subject of an investigation by the Attorney General when he ran a judo school in 1974 and a stereo tape distributorship in 1975. *See, e.g., United States v. Mackey*, No. 75 CR 468 (E.D.N.Y. 1975) (JBW) (convicting Mackey of mail fraud).

In 1988, defendants Davis and Whelan were admitted to the shelter, allegedly on the condition that they comply with the Temple's goals and rules. Thereafter, Whelan and Davis withdrew from the Temple and its shelter, and informed defendant Jack Newfield, then a staff writer for the *Daily News*, about Mr. Mackey, the Temple, and conditions at the Temple's shelter. Petitioners allege that Davis and Whelan told "lies" and "half-truths" to Newfield and to the Attorney General in retaliation for being ousted from the shelter. App. at 29-30. In this way, petitioners allege that Davis, Whelan, Newfield and the *Daily News* joined the Attorney General's purported conspiracy against Mackey and the Temple. App. at 31-32.

Thereafter, the Attorney General's Charities Bureau commenced an investigation and issued subpoenas to Mackey and other Temple members. Newfield, in his column for the *Daily News*, reported on Mackey and the Temple, and on the

issuance of subpoenas by the Attorney General to Mackey and other Temple members.

On December 6, 1988, the Attorney General moved in New York Supreme Court for an order requiring Mackey and the Temple to comply with these outstanding subpoenas. Mackey and the Temple cross-moved to dismiss the Attorney General's action and to quash the subpoenas as beyond the authority of the Attorney General and because they allegedly violated their constitutional rights. On January 4, 1990, the State Court granted the Attorney General's Motion to compel compliance with the subpoenas and denied petitioners' cross motion to quash. App. at 129-137.

Shortly thereafter, Newfield and the Daily News published additional newsworthy information about Mackey and the Temple which Mackey and the Temple also claim to be part of the continuing conspiracy to deprive them of their constitutional rights. App. at 49.

REASONS FOR DENYING THE WRIT

Petitioners have presented no issue warranting this Court's review of the decision below. Petitioners' constitutional argument (that the application of collateral estoppel is a denial of due process) was not raised in the courts below and is frivolous in any event. The Court of Appeals' decision does not conflict in any way with any decisions of this Court or with those of other Circuits. The Court of Appeals faithfully and correctly adhered to this Court's precedent governing abstention, reservation of federal claims, and the collateral effects of prior state court proceedings. The Writ should be denied.

SUMMARY OF ARGUMENT

Petitioners' federal civil rights claims are now barred by the doctrine of collateral estoppel. Petitioners' due process rights were not violated by precluding them from relitigating their civil rights claims in federal court because decisive issues were clearly raised and necessarily decided in a prior state court proceeding in which the petitioners had a full and fair opportunity to litigate these same issues. Moreover, petitioners had an opportunity to challenge the findings of the state court, but chose not to pursue their appeal. Therefore, petitioners cannot argue that the state court findings were biased or based on an inadequate record which it was not allowed to develop.

Furthermore, because the District Court declined to exercise jurisdiction in favor of a pending state court proceeding on the basis of *Younger* abstention, petitioners could not reserve their federal civil rights claims from state court adjudication. The Court of Appeals correctly found that the reservation of federal claims under the procedure described in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), is applicable only in *Pullman*, not *Younger* abstention situations.

The District Court properly dismissed petitioners' conspiracy claim pursuant to 42 U.S.C. §1985(3) for failure to state a claim upon which relief may be granted. Petitioners were properly precluded as a matter of law from pursuing their federal conspiracy claim in federal court because a prior state court judgment had already determined that the Attorney General was not acting in bad faith in his investigation of either Mackey or the Temple and that petitioners' constitutional rights had not been violated by anything respondents had done. Furthermore, the courts below properly held that petitioners' conclusory allegations of a purported conspiracy between the Attorney General and the *Daily News* lacked the requisite factual specificity and did not allege any class-based animus.

Finally, because petitioners were precluded as a matter of law from establishing the elements of their federal law claims, the Court of Appeals properly affirmed the District Court's dismissal of petitioners' pendent state law claims for lack of subject matter jurisdiction.

ARGUMENT

POINT I

THE WRIT SHOULD BE DENIED BECAUSE PETITIONERS' DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN THE COURT OF APPEALS AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' FEDERAL CIVIL RIGHTS CLAIMS AS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL

Petitioners' due process rights were not violated or prejudiced when the District Court properly precluded relitigation of petitioners' federal civil rights claims in federal court, because the same issues were actually litigated and necessarily decided in a prior state court proceeding in which the petitioners had a full and fair opportunity to present their case.[2]

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[2] The Petition herein does not even cite, much less discuss, the three decisions of this Court which establish the controlling legal principles applied by the courts below. *Migra v. Warren City School District*, 465 U.S. 75 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980). Petitioners' quarrel with the application of settled legal principles to the particular facts of this case is not an issue this Court should entertain. To the extent petitioners rely on conflicting state and federal decisions which predate *Migra*, *Kremer* and *Allen*, those decisions are no longer good law.

After careful review of both Justice Greenfield's order and Judge Raggi's abstention decision, the District Court determined that petitioners had a full and fair opportunity to litigate in state court, and that they actually did litigate issues necessary to their federal claims, but failed to make any showing of constitutional violations by respondents. Therefore, dismissal of petitioners' claims pursuant to §1983 was warranted and required, and the Court of Appeals properly affirmed the District Court judgment.

Pursuant to 28 U.S.C. § 1738, a federal court must apply the rules of collateral estoppel of the state in which a prior judgment was rendered, when the same issues are later raised in a civil rights case in federal court. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *Allen v. McCurry*, 449 U.S. 90, 104 (1980). Under New York law, "the doctrine of collateral estoppel [issue preclusion] . . . precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, or those in privity, whether or not the tribunals or causes of action are the same." *Murphy v. Gallagher*, 761 F.2d 878, 881 (2d Cir. 1985), *quoting Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 500 (1984). The doctrine of collateral estoppel is fatal to petitioners' "attempt to relitigate claims already litigated and decided in state court. . . ." *Neustein v. Orbach*, 732 F. Supp. 333, 342 (E.D.N.Y. 1990), *citing Murphy*, *supra* at 879.

The Court below properly applied New York law on the issue of collateral estoppel. Under New York law, collateral estoppel applies here because two conditions have been met: first, the same issue necessarily was decided in the prior action and is decisive in the present action, and second, the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination. *Kaufman v. Eli Lilly and Co.*, 65 N.Y.2d 449, 455 (1985).

In a January 4, 1990 Order, the New York State Supreme Court rejected petitioners' constitutional defense in denying petitioners' cross-motion to quash the Attorney General's subpoenas. Under New York law, a subpoena duces tecum will be quashed upon a demonstration that compliance will infringe fundamental rights, such as those guaranteed by the First and Fourth Amendments. *Matter of Grand Jury Subpoenas*, 72 N.Y.2d 307, *cert. denied*, 488 U.S. 966 (1988); *Full Gospel Tabernacle, Inc. v. Attorney-General*, 142 A.D.2d 489 (3d Dep't 1988).

Justice Greenfield's order indicates that petitioners actually raised the decisive constitutional issues as a defense in the State Court proceeding. January 4 Order at 6-7: App. at 135-136. Moreover, petitioners' counsel's affidavit in opposition to the Attorney General's Motion to Compel and in support of petitioners' Motion to Quash explicitly argues that the same constitutional claims are at stake in both the federal and state actions.

> It would be impossible for this Court to compel compliance with those subpoenas if it is found that the Attorney General did in fact conspire to deprive respondents of their constitutional rights, and started his investigation, and instituted his subpoenas, in bad faith. The necessity for the Attorney General to show good faith, and that he did not issue the subpoenas in bad faith, is an indivisible part of showing that he did not further the conspiracy.

Affidavit of James Roberson, Jr., Esq., sworn to on December 19, 1988 (the "Roberson Aff.") ¶ 11: App. at 101; *see also* Roberson Aff. ¶10: App. at 100-101.

The state court specifically found "no basis for concluding that the Attorney General is acting in bad faith in pursuit of his

investigation of either Mackey or the Temple." Greenfield Order at 6: App. at 135. This finding alone precludes petitioners from establishing that any unlawful conspiracy existed.

The showing that petitioners would have to have made to quash the subpoenas on First Amendment grounds was described by the Appellate Division in *Full Gospel Tabernacle*, *supra*, as follows:

> The burden [is] on petitioners in the first instance to make at least *some* showing that the production of information would impair other First Amendment rights . . . Once such a showing is made, the prosecution has the burden of establishing that the infringement is outweighed by a compelling State interest, to which the information sought is substantially related, and that the State's ends may not be achieved by less restrictive means.

Full Gospel Tabernacle, 142 A.D.2d at 493 (emphasis added, citations omitted). The state court held that plaintiffs could not even meet this threshold burden:

> The investigation by the Attorney General herein is "designed to serve those interests without unnecessarily interfering with First Amendment Freedoms." *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 637 (1980). *It should be stressed that the investigation does not prevent Mackey or the Temple from practicing their religious activity, nor is it disruptive to such activity* . . . After reviewing the complaints of Mackey and the Temple in the District Court action and the papers submitted by them in this proceeding, this court finds *no basis for concluding that the Attorney General is acting in*

> *bad faith* in pursuit of his investigation of either Mackey or the Temple.

Greenfield Order at 6 (emphasis added): App. at 135.[3]

A determination that petitioners' constitutional rights were not violated by the Attorney General's investigation was necessary to Justice Greenfield's decision. Roberson Aff.: App. at 100-101. Moreover, such a determination was actually made. Greenfield Order at 6-7: App. at 135-36. Because the issues to be decided in the federal court action were identical to issues already necessarily decided by the state court, the first condition for collateral estoppel under New York law was undeniably satisfied.

Furthermore, petitioners cannot argue that they were denied a full and fair opportunity to litigate the federal constitutional issues in the state court proceeding. Petitioners had ample opportunity to prove their constitutional claims; first, in the District Court before Judge Raggi on their motion for a preliminary injunction, and second, in the state court before Justice Greenfield on their cross-motion to quash. Petitioners have repeatedly failed to make even a threshold showing of any constitutional deprivation.

The state court specifically held "that the District Court has deferred to this court to determine the various issues raised by Mackey and the Temple" (App. at 137), because "the state court could properly address the constitutional claims of respondents with respect to privacy, free association, freedom of religion and the right against self-incrimination." App. at 132.

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[3] Justice Greenfield also specifically found that the Attorney General's actions did not violate petitioners' Fifth Amendment rights. *Id.*

In opposing the subpoenas in State Court, petitioners argued that the Attorney General had to make a showing of a compelling State interest, that their First, Fourth, Fifth, and Fourteenth Amendment rights were violated, that compliance with the subpoenas violated their rights of privacy, freedom of association and religious belief, and that the Attorney General was engaged in a conspiracy to deny Mackey and the Temple their constitutional rights. It is therefore clear and obvious that petitioners had a full and fair opportunity to litigate these decisive constitutional issues.

More importantly, the State Court specifically rejected petitioners' argument that the Attorney General lacks the power to investigate them and that the investigation somehow violates petitioners' constitutional rights. *See* Greenfield Order at 7-8: App. at 136-37. Thus, even if the Daily News respondents had "conspired" with the Attorney General to cause the investigation into petitioners' activities, petitioners cannot possibly show any deprivation of their federal constitutional rights.

The preclusive effect of prior state court judgments upon federal civil rights actions is well recognized. In *Bartel Dental Books Co., Inc. v. Schultz*, 786 F.2d 486 (2d Cir.), *cert. denied*, 478 U.S. 1006 (1986), the Court of Appeals looked to New York law and affirmed the District Court's holding that plaintiff's § 1983 action was barred based on plaintiff's prior state court Article 78 proceeding which was abandoned prior to the filing of the federal suit. Despite plaintiff's contention that there had been no prior hearing on the issue, the Court stated:

> We apply the doctrine of *res judicata* to the facts of this case without regard to whether a hearing was actually granted in state court . . . [plaintiff] could have pressed the [§ 1983] issue in the Article 78 action, but chose instead to concentrate on getting a

> stay of the order to vacate. Plaintiff had a "full and fair opportunity" to litigate the claims brought here.

786 F.2d at 489. *See also Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

Furthermore, in *Bartel* the Court specifically recognized that "New York Courts look to whether a claim has been 'brought to a final conclusion,' not to whether a full evidentiary hearing has been held on the claims." *Bartel, supra, citing O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981) ("once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy").

In a case virtually identical to this one, *Sreter v. Hynes*, 419 F. Supp. 546 (E.D.N.Y. 1976), the District Court (Pratt, J.) held that federal plaintiffs who had previously sought unsuccessfully in state court to quash a subpoena issued by the Deputy Attorney-General of the State of New York were collaterally estopped from re-litigating civil rights claims in connection with that subpoena, whether or not such claims were actually argued in state court. *Id.* at 548. Furthermore, the Court noted that *Younger* abstention was appropriate and that the district court lacked jurisdiction to review state court determinations of federal constitutional questions. *See Tang v. Appellate Division of New York Supreme Court, First Dept.*, 487 F.2d 138, 141 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974).

Because petitioners' constitutional claims have already been determined against them, the doctrine of collateral estoppel bars relitigation of the federal law issues in this case and precludes the existence of a conspiracy to deprive petitioners of their constitutional rights. *Allen v. McCurry*, 449 U.S. 90, 104

(1980). Petitioners' due process argument was not raised below and has no merit whatsoever, because petitioners had adequate notice and a full and fair opportunity to litigate the decisive issues which the state court resolved against them. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317, 330 (1967). Accordingly, the Writ should be denied.[4]

POINT II

THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY DETERMINED THAT UNDER *YOUNGER* ABSTENTION PETITIONERS COULD NOT RESERVE FEDERAL CLAIMS FROM STATE COURT ADJUDICATION

Petitioners claim to have preserved the right to federal court jurisdiction over their federal conspiracy claims pursuant to the doctrine of *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

The Court of Appeals properly determined that petitioners' reliance on *England* is misplaced because the procedures formulated in that case relate specifically to the abstention doctrine established by *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), not to the *Younger* doctrine upon which Judge Raggi abstained in this action. "Indeed, despite [petitioners'] argument to the contrary, the

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[4] The only decision of this Court cited in the Petition which remotely addresses the issues in this case is *Montana v. United States*, 440 U.S. 147 (1979). In *Montana*, however, this Court recognized that "[u]nder collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Id.* at 153. The opinion of the Court of Appeals does not conflict in any way with the holding in *Montana*.

decision in *England* itself makes clear that its intended application is only to *Pullman* abstention situations. *See* 375 U.S. at 415-16 and n.7." *Olitt v. Murphy*, 449 F. Supp. 322, 323-24 (S.D.N.Y. 1978).

Judge Raggi, in her June 7, 1989 Memorandum and Order, invoked the doctrine established in *Younger v. Harris*, 401 U.S. 37 (1971), when she abstained from exercising federal jurisdiction over petitioners' action until the state court proceeding came to a conclusion. Raggi Order pp. 15-22: App. at 120-127. *Younger* requires federal courts to dismiss or stay federal actions on the basis of consideration of equity, comity and federalism when there is a pending state proceeding in which the same federal claims can be raised. *Id.*; *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

Younger abstention is warranted when "(1)... there is an ongoing state proceeding; (2) ... an important state interest is involved; and (3) ... the federal plaintiff has an adequate opportunity for judicial review of his constitutional claims during or after the [state] proceeding." *Christ the King Regional High School v. Culvert*, 815 F.2d 219, 224 (2d Cir.), *cert. denied*, 484 U.S. 830 (1987). *See Neustein v. Orbach*, 732 F. Supp. 333 (E.D.N.Y. 1990). Judge Raggi found all three conditions for *Younger* abstention were met. Raggi Order at 15-17: App. at 120-22. Moreover, Judge Raggi found no evidence of bad faith on the part of the Attorney General to justify invoking the bad faith exception to *Younger* abstention. *See Dombrowski v. Pfister*, 380 U.S. 479 (1965). Judge Raggi held:

> There being no evidence of bad faith sufficient to excuse abstention and this court being convinced that plaintiffs can adequately raise their constitutional challenges to the Attorney General's conduct in pending state proceedings, this court abstains now from addressing those claims.

Raggi Order at 20: App. at 125.

In its abstention order the district court specifically cautioned that "[h]ow the state court rules with respect to the question of whether the Attorney General was involved in any conspiracy with the other named defendants - and if he was, whether their mutual objectives were unconstitutional - could, after all, have collateral estoppel effect in proceedings in this court, at least as against plaintiffs." Raggi Order at 20: App. at 125.

Petitioners did not then and cannot now dispute that they could and did raise their constitutional challenges to the Attorney General's investigation in the pending state proceeding. *See* Raggi Order at 17: App. at 122; Greenfield Order at 6-7: App. at 135-36. It is also indisputable that petitioners made an application by Order to Show Cause to preclude the state court from addressing their federal conspiracy claims which was summarily rejected by that court.[5] *See* Reply Affidavit of Henry Jerome Mackey, sworn to on March 29, 1990 ("Mackey Reply Aff."), ¶16, and Exhibit B attached thereto: App. at 207, 216-224. In his affidavit in support of such order to show cause, Mr. Mackey acknowledged that the state court's decision would have collateral estoppel effect in the pending federal suit. Mackey Reply Aff., Exhibit B: App. at 222, ¶ 3.

Nevertheless, petitioners contend that they somehow reserved the issue of conspiracy for federal determination under the doctrine of *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). Petitioners' reliance upon their purported *England* reservation is misplaced. *England* is

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[5] Judge Greenfield declined to sign appellant's Order to Show Cause and stated that the "Court will not be barred from considering whatever is appropriate for decision." Mackey Reply Aff., Exhibit B: App. at 216.

simply irrelevant when a federal court finds *Younger* abstention appropriate. *Olitt v. Murphy*, 453 F. Supp. 354, 358 (S.D.N.Y.), *aff'd w.o. opinion*, 591 F.2d 1331 (2d Cir. 1978), *cert. denied*, 444 U.S. 825 (1979) (purported *England* reservation ineffective in face of *Younger* abstention).

Only when a party is remitted to state court on abstention grounds for the purpose of resolving or clarifying an unsettled issue of state law under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), can it retain the right to return to the district court for a determination of his federal claims. Under *Pullman*, a federal court stays disposition of federal issues while remitting the litigant to state court to reach state issues as necessary to avoid deciding an issue of constitutional law or to avoid an erroneous determination of state law. To avoid being barred by a state decision on a federal claim, but also to insure that the entire controversy is presented to the state court, the Supreme Court in *England* adopted the following procedure for *Pullman* cases: a party may preserve his federal law claims by presenting the whole case to the state court and informing it that the party intends to return to federal court for final disposition of federal claims should the state court rule against him. *England* at 421-422.

However, when a state proceeding is pending and the *Younger*, not *Pullman*, abstention doctrine applies, all claims, both state and federal constitutional claims are to be presented to the state court. *Gibson v. Berryhill*, 411 U.S. 564 (1973). Furthermore, "under the *Younger* doctrine, a would-be federal plaintiff is required to exhaust all state appellate remedies before seeking federal court relief and the state proceeding is deemed pending until such time." *Olitt v. Murphy*, 449 F. Supp. 322 (S.D.N.Y. 1978), *citing Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-11 (1975).

Petitioners were required to present their federal constitutional claims in the state proceedings.[6] In fact, they did present them and decisive issues were finally determined against petitioners, notwithstanding their purported *England* reservation. Petitioners' reliance on *England* is misplaced and their purported *England* reservation is of no effect. *Olitt v. Murphy*, 453 F. Supp. 354, 358 (S.D.N.Y.), *aff'd w.o. opinion*, 591 F.2d 1331 (2d Cir. 1978), *cert. denied*, 44 U.S. 825 (1979). Accordingly, the petition for certiorari should be denied.

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[6] Even though appellants had no right to return to the District Court to relitigate their federal claims (because decisive issues were decided against them in the state court), this Court retained appellate jurisdiction over any federal issues decided by the state court. *Burford v. Sun Oil Co.*, 319 U.S. 315, 319 (1943). Appellants, however, voluntarily withdrew their state court appeal, despite full knowledge of its possible collateral estoppel effects.

CONCLUSION

For all the reasons set forth above, petitioners have presented no persuasive reason for this Court to review the unanimous decision of the Court of Appeals. The Writ should be denied.

Respectfully submitted

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